

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

RSA No.5034 of 2012 (O&M)

Date of decision:03.05.2018

Kashmir Singh and another ... Appellants

Vs.

Gurnam Kaur and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Vinod Khunger, Advocate
for the appellants.

Mr. Kamal Narula, Advocate
for the respondents.

AMIT RAWAL J. (Oral)

The present Regular Second Appeal is directed against the judgments and decrees of both the Courts below, whereby, suit for recovery of Rs.1,24,846/- alongwith interest @ 18% per annum on account of business transaction, has been decreed by the trial Court and upheld by the Lower Appellate Court.

The plaintiff instituted the suit for recovery of Rs.1,24,846/- (Rs.93,866.22 paisa as sale price and Rs.30,980/- as interest at the rate of 18% per annum to be recoverable from the defendants jointly and severally on the ground that plaintiff used to sell crop to the firm of defendants for about 7-8 years and upto December 2002 on the basis of Form 'J' but the amount was not paid resulting into issuing a legal notice dated 24.07.2004

and having not addressed the reply, constrained to file a suit on 25.08.2004. The suit was filed against M/s Lahoria Trading Company Commission Agents Mallanwala through Mehal Singh and Nishambar Singh being partners.

The defendants filed written statement by taking a plea of maintainability, non-joinder and mis-joinder of necessary parties. It was stated that neither Mehal Singh nor Nishambar Singh was ever partner of the firm and there was no dealing.

Since the parties were at variance, the trial Court framed as many as 6 issues including the issue of Relief. The plaintiff examined three witnesses and closed the evidence. On the other hand, defendant Nishambar Singh stepped into witness box as DW1 and despite availing 12 effective opportunities including 4 (four) last opportunities failed to conclude the evidence. On the basis of evidence, the trial Court decreed the suit and the Lower Appellate Court affirmed the findings of trial Court.

Mr. Vinod Khunger, learned counsel appearing on behalf of the appellants submits that Nishambar Singh, during the pendency of suit when the case was listed for plaintiff's evidence, died and Dilbagh Singh, Kashmir Singh, Mehal Singh, Balvinder Kaur, Sukhwinder Kaur, Rajinder Kaur and Surjit Kaur were brought on record as his legal representatives. In the testimony of PW2, it has come on record that firm Lahoria Trading Company was in the name of Kashmir Singh son of Nishambar Singh w.e.f. 01.04.2002 to 31.03.2003. The suit could not have been decreed for non-impleadment of Kashmir Singh. Neither he was impleaded as a party in the

suit in any capacity either as partner or as a proprietor of the firm. The aforementioned objection was taken before the Lower Appellate Court but the Lower Appellate Court while relying upon the judgment of the Hon'ble Supreme Court rendered in **Prem Lala Nahata and another Vs. Chandi Prasad Sikaria 2007 AIR (SC) 1247**, affirmed the findings of the trial Court. He further submits that appellants had not been granted any opportunity to file written statement and therefore, the suit was liable to be dismissed and could not have been decreed against the appellants.

Mr. Kamal Narula, learned counsel for the respondents submits that judgments and decrees of the Courts below do not call for any interference as Kashmir Singh was LR of Nishambar Singh and it has been proved on record that firm belonged to him. The transactions were based upon the documentary evidence. No fault can be found with the judgments and decrees of the Courts below based upon the appreciation of oral and documentary evidence as the ratio decidendi culled out in the judgment cited above squarely supported the case of respondent-plaintiffs.

I have heard the learned counsel for the parties, judgments and decrees as well as records of both the Courts below and of the view that it is a fit case where the matter requires to be re-visited, for, with all humility and respect, judgment referred to above did not deal with provisions of Section 21 of Limitation Act. No person can be condemned unheard, particularly when a specific objection was non-impleadment of proper party. The entire tenor and mode of the judgment (cited supra) was on the rejection

of the plaint while adjudicating the application under Order 7 Rule 11(d) of CPC. The appellants have been prevented from putting defence or cross-examination to the witnesses of the respondent-plaintiffs. All these factors are required to be looked into by the Lower Appellate Court for pith and substance of the judgment for dismissal of the appeal is based upon the judgment referred to above.

As an upshot of my findings, the judgment and decree of the Lower Appellate Court is hereby set aside and the matter is remitted to the Lower Appellate Court to decide the appeal afresh, in accordance with law as expeditiously as possible.

The appeal stands allowed.

The parties through their counsel are directed to appear before the Lower Appellate Court on 24.05.2018.

(AMIT RAWAL)
JUDGE

May 03, 2018

savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No